BOOK REVIEWS.

COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES. By Burr W. Jones, Professor of the Law of Evidence in the College of Law of the University of Wisconsin. Rewritten, enlarged and brought with authorities up to the present date, by L. Horwitz of the San Francisco Bar. Bancroft-Whitney Company, San Francisco, 1913, 1914. pp. Vol 1, xxxvi, 1031; Vol. 2, x, 1071; Vol. 3, x, 1036; Vol. 4, ix, 976; Vol. 5, vi, 1157.

The past decade has brought a rich endowment to the law of evidence. With the works of ELLIOTT, WIGMORE and CHAMBERLAYNE, all of the most exhaustive character, to say nothing of several less pretentious books on the subject, it can well be said that no branch of the law has had, in the same period, such comprehensive, and in the case of at least some of its expositions, such competent treatment, as has the law of evidence. And it is to be said in the outset, that the work before us is no mean contribution.

As we read the title the question is at once suggested: Why should the author say "Commentaries on the Law of Evidence in *Civil* Cases?" Is it because there is required a different kind of evidence, or a different method of proof to establish a fact dependent upon whether it is material in a civil or a criminal case? Evidently not, for the author in his treatment seems to recognize no such distinction, and in the law there is none.

To the reviewer there is but one rule of evidence of any partciular significance, which differs in civil cases from that which obtains in criminal cases, and that is the rule as to the degree of conviction which must be produced in the minds of jurors that they may be justified in finding a verdict. The author has not so limited his title however, to avoid the discussion of the rule of evidence upon this particular subject as applied to criminal cases, for in volume one, pages 24-29, he has discussed this very subject as involved in criminal trials.

Earlier writers on this general subject, after devoting considerable space to the discussion of the general principles of evidence, were wont to give a much larger proportion of their work to the setting forth and discussion of the rules determining what evidence was admissible and necessary to establish particular causes of action or crimes, such discussions being arranged alphabetically by name of the cause of action or offence. It might well be that so far as such latter treatment is concerned, an author might devote his discussion to rules applicable alone to civil or to criminal cases. But our author has not attempted this sort of discussion, and it is well he has not, for such a discussion, upon principle, pertains not to the law of evidence, but is rather a discussion of rules of substantive law defining causes of action or offences.

In truth his treatment belies his title, for he sets forth and discusses rules of evidence and illustrates their application with equal freedom, to criminal as well as to civil trials. Attention has already been called to his discussion

of the rule as to the measure of persuasion to be applied in criminal cases. Other notable illustrations of this treatment may be found in the author's discussion of the presumption of innocence, volume one, pp. 88-98. True, this same fact of guilt or innocence of crime may be involved in civil cases, but the author's discussion referred to is not of the rule from the point of view of the civil trial, but rather deals with the effect of this rule of presumption in criminal trials, though upon principle it would matter nothing whether the rule were involved in a civil or a criminal trial. Naturally it has its most frequent application in criminal cases.

So again, in his discussion of so-called "conflicting presumptions," notably that of innocence with that of chastity, of sanity and the like, volume one, pp. 484-499, it is presented from the point of view of the criminal trial. Indeed the treatise is full of similar illustrations of the author's disregard of the limitations of his title.

This extended discussion of the relation of the title to the treatise itself, is justified if at all, upon two grounds: first and primarily, because there seems to be a real need of emphasizing the truth of the proposition that the same rules of evidence are to be applied in proving a fact whether that fact is material in a civil or a criminal trial; and second, because it is not quite fair to the practitioner who happens to be interested in a criminal trial that he should be misled as to the value of this work because of its title. It is scarcely to be justified in this day that one should give the impression that there is one body of rules of evidence applicable alone to civil cases and another and distinct body of such rules applicable alone to criminal trials. In the nature of the general subject this cannot be true.

Without attempting more than an orderly presentation of the law as it is, with little or no attention to the question of how it came to be so, or in what respects it might be improved, the author covers well the ground within his chosen field. His statement of the law as drawn from the cases seems justified, clear and in good form. It is however a little difficult for one not very familiar with the text, to determine whether particular statements are upon the authority of the author or the author-editor, and in some cases it might be desirable to know.

It has been said that the author-editor has failed "to profit as he should by the light which shines from Professor WIGMORE'S pages." This may be true as to some parts of the work, but other portions bear evidence that good use of such light has been made. It is more than doubtful whether the discussions of the somewhat troublesome subjects of "presumptions" and "burden of proof" could have been written as we find them here, except for the writer's thorough familiarity with the work of THAYER and WIGMORE. In view of this, one at all appreciative of the work of Professor WIGMORE is a bit irritated at the lack of courtesy if not of dignity, which permits the author to indulge in such covert criticism of his work as is apparent in places, illustrations of which are found in the last paragraphs of the introduction to this edition, and in the last paragraph of section "90(8)." Statements of the sort referred to would not look too well in a dignified commercial advertisement of the work, and make a much worse impression in the book itself.

One hesitates to call attention to these defects, if such they are, in so good a piece of work. Mistakes there may be, so there are in all books, and fewer in this, it may be, than in many, if not than in most.

It is understood that the earlier editions had found many friends in the profession, and this edition, should, by reason of its more thorough discussion and wider citation of authority, increase the number. One may not be surprised if it is found to be even more popular with trial lawyers than some works giving greater evidence of scholarship. This because of the fact that its aim, as indicated, is to state the law as it is without the risk of obscurity which might come to the careless reader with the added discussion of the historical development and suggested betterment of the law. It will be too much to expect that it will supplant some works now before the profession with the courts of last resort of the country, with whom, there is desired in greater measure than with the trial lawyer, the historical and more critical discussion of rules they are called upon to apply. The very nature of their task requires this.

Mechanically the book is all that could be wished. Printed on thin paper the volumes are convenient to handle and the typography is excellent.

V. H. L.

THE VALIDITY OF RATE REGULATIONS: STATE AND FEDERAL, by Robert P. Reeder, of the Philadelphia Bar. Philadelphia: T. & J. W. Johnson Co. 1914; pp. xv, 440.

The book admits of a division into two parts. Part one might well be described as a critical examination of the decisions of the courts, especially of the Supreme Court of the United States touching matters involving the fifth and fourteenth amendments to the Constitution of the United States. Part two, beginning with page 154, is a brief statement of some of the principles governing the making of rates for common carriers, especially those engaged in interstate business. The first part is certainly not a statement of what the law is, but rather of what, in the opinion of the author, it should be, with a discussion and criticism of what the courts have declared that it is. For illustrations see especially sections 62ff, 71ff, 86ff, 112ff. The author seems to feel that the courts, in passing upon statutes enacted by Congress, have a right of review only of such matters as are expressly referred to in the Federal constitution, and that in so far as they have based any of their decisions on legislative enactments upon abstract principles of right, natural justice, or any principles not expressly touched upon by the Constitution, they have usurped the province of the Legislature. It might seem that it is now too late for fruitful discussion, especially in a book that may be supposed to be offered as a text, of principles that have been regarded as settled by a long line of decisions, but the author, in section 132, tells us that the past course of the courts has resulted in such a "tangled web of inconsistent decisions, which show every sign of becoming more and more tangled as time goes on," and accordingly he implies that it is desirable, and it may be